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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-

ANNIE McMILLAN, as personal representative of the Estate of EDGAR McMILLAN, deceased, and on behalf of herself, individually,

Petitioner,

-v.-

MARINE SULPHUR SHIPPING CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-_____

ANNIE McMILLAN, as personal representative of the Estate of EDGAR McMILLAN, deceased, and on behalf of herself, individually,

Petitioner,

-v.-

MARINE SULPHUR SHIPPING CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Annie McMillan, as personal representative of the Estate of Edgar McMillan, deceased, and on behalf of herself, individually, respectfully prays that a writ of certiorari issue to review the judgment

and opinion of the United States Court of Appeals for the Second Circuit entered on October 9, 1979. [Appendix A, 1a] That decision reversed a judgment entered on behalf of the plaintiff for $311,783.00 in the United States District Court for the Southern District of New York following a jury verdict. [Appendix B, 16a and 37a].

The respondent had raised several issues in its appeal, but the Court of Appeals stated that it was unnecessary to discuss them since it decided that the District Court erred in failing to grant the defendant's Motion for Judgment N.O.V. The petitioner seeks the issuance of the writ of certiorari only to review the judgment of the Court of Appeals reversing the judgment of the District Court and granting a Judgment N.O.V. in favor of defendant.

OPINIONS BELOW

The opinions of the District Court denying defendant's motion for judgment n.o.v. or for a new trial dated November 22, 1978. [Appendix B, 17a] and of the Court of Appeals reversing the judgment and directing judgment n.o.v. for defendant [Appendix A, 1a] are attached, dated October 9, 1979. They have not been reported.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) The original jurisdiction of the District Court is based on 28 U.S.C. §1332, 33 U.S.C. §901, et.seq. and the general maritime law.

STATUTORY PROVISION INVOLVED

Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, is set forth as Appendix C to this Petition. [40a]. 33 U.S.C. 905(b).

QUESTIONS PRESENTED

1. Where there is evidence allowing an inference, rationally drawn, as to how an accident happened and whether defendant's conduct was negligent, may a jury accept (or reject) it even though there are conflicting inferences which can be made?

2. On a motion for judgment n.o.v. in a maritime negligence case involving the 1972 Amendment, 33 U.S.C.§905(b), may a court reweigh the evidence and set aside a jury verdict if it drew different conclusions and felt that other results are more reasonable?

3. Is a person covered by 33 U.S.C.901, et.seq., entitled to the same standard of care as persons in other maritime law cases, where the risk is created by activities which are directly under the control of the vessel?

4. Is "negligence" in cases affected by 33 U.S.C. §905(b) determined by maritime law or by other standards of care and proof?

REASONS FOR GRANTING CERTIORARI

The Court of Appeals stated and followed a rule of law that "if the circumstantial evidence presented lends itself to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts". This criteria conflicts with an established line of cases of this court holding that a jury can select any inference which may be rationally drawn from the evidence and can reject other possible inferences. See Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct.

608, 100 L.Ed. 668 (1955) and cases cited, infra.

In cases affected by the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), conflicts have arisen in the Courts of Appeal as to the standards of negligence and proof required to establish such negligence. This case presents important questions of federal maritime law and procedure which affects many present and future cases. Certiorari should be granted to decide them for the guidance of courts and counsel in the future.

STATEMENT OF FACTS

This case involves an accident on November 18, 1973 which was described in the official report submitted by the master of the vessel, Marine Duval, [279a-17 PL. Exh. 6 at 674a]:

> "Man drowned after being struck by parting after spring wire, while vessel was docking at U.S.P.P. In West Tampa, Florida."

The autopsy report gives a diagnosis: "Drowning,fracture of left leg" [Pl. Exh. 12, 680a]. The wire involved was a "1-1/8 purple strand" [Pl. Exh. 7, 675a]. The hour of the accident was given as "approximately" 2100 hour. [677a]. The engine book indicates that at 2106 1/2 the engine room had received a signal "slow astern"; at 2107 a signal to stop the

ship's engines and at 2110 a man was reported overboard from the dock. [689a] The deck log reported that at 2105 the first line was passed to the dock and at 2110 a man was reported overboard from the dock [670a]. The times used in the records are "approximations" rather than precise entries [352a-5]. The court can take judicial notice of the fact that stopping engines does not necessarily halt the rearward motion of the vessel, if it had any.

The S.S. Marine Duval, a sulphur tanker, with cargo on board, approximately 612 feet long, was being secured to a berth in navigable waters in Tampa, Florida. [Pl. Exh.8, 676a]. The vessel was being docked on its port side. [186a-15]. The dock area where it was preparing to tie up was into and over the water. [Pl. Exh. 3-A, 3-B, 666a, 667a].

Chief Mate Hoffman said the vessel was "moving in to the dock" at the time of the accident. He was in charge of the forward tying up. [188a-3]. The forward spring line which he was watching was taut. [216a - 16]. At the time the vessel was "too far forward" and the spring lines were being used to move the ship back. [246a - 11]. This is done by putting the spring lines in tension. [246a - 21].

At the time of the docking, there were two lines connecting the vessel to the dock. They led from separate manually controlled capstans on the ship and were both attached to a single bollard on the dock. [190a - 15]. Two tugs assisted the vessel. They were on the starboard bow and on the starboard quarter, although the exact direction of their movement at the time of the

accident was not specifically set forth in the testimony. [191a - 17].

In addition to the two tugs a "bow thruster" was being used to assist in the docking. [289a - 18; 349a - 4]. This is an engine located as far forward on the vessel as practical to move the bow in and out to help position the vessel. [289a - 20]. Captain Newman testified that he believed it was in operation at the time of the accident. [349a - 4]. With reference to Chief Mate Hoffman's answer to a question, "Was she moving in evenly from what you could determine?" he said "As far as I remember it was." [252a - 2]. However he also testified, "The only thing I can think of now is, we were too far forward --- and we had to move the ship back." [246a - 9].

The Court of Appeals in reversing the District Court ignored the above

testimony and the inferences to be drawn from it and stated [4a - 17]:

> "--The ship's engines were stopped minutes before the accident, leaving only the pressure of the tugs to push the ship laterally to port and, in the Chief Mate's recollection, at an even pace toward the pier.--"

See also the court's repetition of this statement [13a - 5]. What Chief Mate Hoffman said directly was "As far as I can remember, we were moving in to the dock. I can't recall whether there was any forward or after movement at the time." [216a - 16]. In addition, in his signed statement of 19 Nov. 1973 he said "We were using the spring line foward. It was made fast to the shore bollard in order to stop the ship." [Pl. Exh. 5 671a]. If the only pressure on the vessel

was on the dock, why would the forward spring line be used "to stop the ship"? The next sentence says that both lines were being used to "spot" the ship alongside the dock, i.e. line it up in the position it had to be to unload [Pl. Exh. 5, 671a]. If the vessel was forward of the "spot" where it had to dock, there had to be some movement aft to bring it into proper position.

Captain Newman, who was captain of the ship and in charge of the entire docking operation, testified that he had a pilot as an advisor. He had to give orders to the tugs, the helmsman, the engine room, operate the "bow thruster" and coordinate the handling of the lines. Walkie-talkies were used to communicate because "its more than a football field to the forward winch." [303a - 6].

In docking the vessel had to be positioned so that the chicksan on the dock would be within one foot of manifolds on the vessel. [302a - 25]. The spring lines are used to position the ship so it can be placed within a foot of where the vessel is to be docked. [300a - 14]. The lines extend from the bow and the stern respectively to a common point on the dock. By hauling in one and slackening off the other, the ship is positioned [306a - 16].

The entire docking operation was under the command of vessel personnel. The deceased had no control over the use being made of the spring wires at the time of the accident. [260a - 16].

A.B. Cooper who controlled the aft spring line by operating the aft tension winch did not testify at trial or at deposition. His signed statement to his

shipowner-employer was used. He did not see the dock and orders were passed to him by another seaman who in turn received them from the Night Mate. He said that the winch was in "stop" position when it parted. [678a]. This means the brake locked on the line. [329a - 13]. He characterized the condition of the wire by saying that at no time did he notice any "undue strain" on the wire. [678a - 10].

The Court of Appeals in its opinion states [4a - 30]:

> "--The function of the spring lines was to hold the vessel in the proper fore and aft position while the tugs pushed her to the dock."

This statement is not accurate. Captain Newman specifically testified [300a - 10]:

"Q Now, Captain, very simply stated, what is the purpose of the spring lines in docking?

A Well, the spring lines, what we basically use when we come in, because the two lines opposing each other, we can position the ship within about a foot of where we want it.

George Newman, Jr., a qualified licensed master mariner, was on the bridge of the Marine Duval at the time of the accident. [285a - 14]. He examined the parted wire after the accident. [308a - 22]. He testified without objection [308a - 23]:

"Q What condition did you find it to be in?

A I found it to be in very good condition.

Q Do you have an opinion as to

why that wire parted?

A Well, there was too much of a strain put on it. "

Chief Mate Hoffman had testified also [211a - 22]:

"Q Should the wire part under the conditions to which it was subjected at the time of docking that day?

A I don't believe it should, no."

Captain Newman stated that if he had been advised that there was a strain on the aft spring line or that it was taut or tense, the vessel could use its tugs or engines to "slack off" or most immediately "slack off" the winch. [344a - 20]. There were no conditions of weather or sea which would cause the line to part. [211a - 22].

There was evidence from which a jury could infer that the vessel was

moving aft as well as laterally at the time of the accident. The forward spring line was taut at the time of the accident. [216a - 21]. Chief Mate Hoffman was not sure whether the mooring windlass on the forward line was turning at the time, but he "believed" that the mooring windlass for the after spring line was in a "stopped" position. [217a - 1]. Since the procedure for using spring lines to move a vessel aft would be to take in on the forward line and let out on the aft line, the jury could infer this was being done since the vessel was forward of the spot where it was to be docked. If the aft line was stopped by a brake and could not move this would build the tension on it.

On these facts and the inferences to be drawn there was an ample basis for a finding that those in control of

the vessel were negligent in that they did not adequately manage the docking operation. This caused the tension on the aft spring line to exceed its tolerance, break, and injure and kill Edgar McMillan.

The District Court agreed that there was sufficient evidence to support the jury's verdict. [21a -6]. The Court of Appeals however, reversed directing the entry of judgment n.o.v. for the defendant. It reviewed the evidence, made its own inferences and stated there was "no basis for finding fault on the part of the vessel." [14a - 31].

POINT I

THE COURT OF APPEALS DID NOT VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, GIVING THE PLAINTIFF THE BENEFIT OF ALL LEGITIMATE INFERENCES, IN REVERSING THE DENIAL OF THE MOTION FOR JUDGMENT N.O.V. BY THE DISTRICT COURT

The basic requirements for a review of the evidence by a court considering a motion for judgment n.o.v. are succinctly stated in Wright, Law of Federal Courts, [3 Ed. West Publ. 1976] §95 at 473:

"The motion for judgment n.o.v., like the motion for directed verdict, raises only the legal question whether there was enough evidence to make an issue for the jury.----The motion for judgment n.o.v., on the other hand, must be denied if there is any substantial evidence supporting the verdict. The credibility of witnesses and weight of the evidence, proper considerations on a motion for a new trial, are not the

concern of the court on a motion for a directed verdict or for judgment n.o.v. The evidence must be viewed in the light most favorable to the party against whom the motion is made, he must be given the benefit of all legitimate inferences that may be drawn in his favor from that evidence, and the motion must be denied if, so viewed, reasonable men might differ as to the conclusions of fact to be drawn.

The rules set out in the foregoing paragraph have been stated and restated, in many forms, by the courts. Though the matter is not yet definitely settled, the better view is that they represent a federal test of sufficiency of evidence that must be followed even if state law sets up some other standard. ----"

(underlining ours)

Nowhere in its opinion does the Court of Appeals articulate the test set forth above. The approach of the court is illustrated by its comment [10a - 15]:

> "Even if we were to exclude the possibilities of a latent defect or accumulated wear, which we do not deem permissible for reasons stated above, negligent operation of aft line and winch is not necessarily the most plausible inference that might be drawn from the record before us. - - -"

(underlining ours)

In short, the court undertook to re-evaluate the evidence, make its own inferences, assign its own value to the "weight" of the inferences and made its own conclusions as to negligence. The approach of the court is illustrated by its comment that because there was testi-

mony submitted in written form of two witnesses it had greater freedom to evaluate the testimony [14a - 5].

However, there was an important witness who did testify. He was Captain Newman, a seaman for 33 years who was in charge of the vessel at the time it was being docked. [282a - 12; 283a - 15]. He testified that he examined the parted wire after the accident and found it "to be in very good condition" [308a - 24], and that in his opinion the line parted because "too much of a strain was put on it." [309a - 3].

There was nothing in the record which indicated that Captain Newman, as an experienced seaman was not qualified to give an opinion as to the condition of the wire or the cause of it parting. These statements alone justified a finding by the jury that neither "a defect"

or "accumulated wear" caused the line to part. In addition, Chief Mate Hoffman had testified that upon his examination of the parted wire [203a - 11] he could not find any defect. [207a - 18; 248a - 22]. The visual examination included the internal areas of the parted wire. There was also a statement from Seaman Gemmill dated November 19, 1973, stating that the wire had been in good condition. [675a]. The Court of Appeals in its opinion noted that a portion of the line was submitted to the American Bureau for more thorough examination, but the results of this, if any, were not introduced in evidence. The testing was done by and on behalf of the vessel. [203a - 18]. The plaintiff's attorney had specifically stated that he did not claim that there was a defect in the wire. [267a - 23].

The defendant did not dispute this position and did not offer any evidence of any test it had made. While the record does not show it, the reason for this was that the tests did not show any latent defect. It was a non-issue in this case. [422a-7].

The jury in this case had the duty to consider the evidence, the inferences to be drawn therefrom and to evaluate and weigh them. This court has repeatedly reaffirmed the jury's function to do this. For example in Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 [1955], Mr. Justice Black stated at page 525:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence

cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise

of common sense and sound judgment under the circumstances of particular cases. - - - - But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For "The very essence of its function is to select from among conflicting inferences

and conclusions that which it considers most reasonable." Fact finding does not require mathematical certainty. - - -"

(underlining ours)

In Tennant v. Peoria & Pekin Union Railroad Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 [1943], Mr. Justice Murphy stated at page 35:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which

is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. - - - That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or

conclusions or because judges feel that other results are more reasonable."

(underlining ours)

See also Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 [1945]; Continental Ore Corp. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962)

The great respect given to the jury's function in making conclusions from conflicting evidence and inferences is not limited to Jones Act or F.E.L.A. cases.

In Yazzie v. Sullivent, 561 F.2d 183 [10 Cir. 1977], the case involved an automobile accident. Judge Dolye stated at page 188:

"Charles Alan Wright in his Law of Federal Courts has cited a series of Supreme

Court decisions reversing judgments of lower courts which have taken away from the jury cases arising under Federal Employers' Liability and Jones Acts. The Supreme Court has held that so long as there is evidence from which an inference might rationally be drawn as to how the accident happened or whether defendant's conduct was negligent, it is for the jury to accept or reject the inference even though it may be improbable and even though some conflicting inference is highly probable. Citing Lavender v. Kurn, 327 U.S. 645, 652-53, 66 S.Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P.U.R.

Company, 1944, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520; Rogers v. Missouri Pacific Railroad Company, 1957, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493. Wright says that these holdings are not confined to FELA and Jones Act litigation since the cases refer to the jury's historic function and to the Seventh Amendment. Also, the Supreme Court has cited these cases as representing the "federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." - - "

POINT II

WHETHER CONSIDERED AS A RULE FOR FINDINGS BASED ON CIRCUMSTANTIAL EVIDENCE OR AS RES IPSA LOQUITOR IT IS FOR THE FINDER OF FACT TO EVALUATE THE EVIDENCE AND DRAW THE INFERENCES THEREFROM EVEN WHERE CONFLICTING INFERENCES MAY BE DRAWN.

The jury on the basis of the evidence and the inferences to be drawn found the defendant negligent. The trial judge in denying the motion for judgment n.o.v. set forth the facts which could be found on the basis of the evidence. She stated [19a - 5]:

> "During mooring, the Night Mate controls the after spring line while standing on the vessel's main deck. He directs the members of the crew who are stationed on the mooring dock below. A member of the crew operates

the mooring winch for this line and either pays out the line, pulls in the line or holds the line in a stop position. Just before the accident, the line was taut and its windlass was in the stop position. The proper procedure is for the Night Mate to control the line so that no excess strain develops on the line. This can be done either by directing the crew member to pay out the line and create slack or by directing via walkie-talkie that the ship change its movement so as to ease the tension on the line.

Both the line and the winch were found during a post-accident inspection to be free

of any visible defect which would have caused the line to break. Plaintiff thus excluded such defects as possible causes of the accident, as it was required to do in order to place liability on the defendant. 1A Benedict on Admiralty (7th Ed.) §118.

Able-bodied Seaman Hardwick Cooper's statement (Pl. Ex. 9) was that he did not notice any undue strain on the line but that he "could see nothing of the action on the dock or forward as the cargo pumps were between me and the action." Chief Mate Robert Hoffman stated that it was his opinion that the line would not have

broken if it had been properly used. Captain Newman, who was in charge of the docking and mooring of the ship, stated that the line broke because too much stress had been placed on it due to some movement of the ship. Therefore, the court finds that there was sufficient evidence for the jury to infer that the line snapped because the strain put on it, that such strain was the result of improper supervision of the line by the officers of the S.S. Marine Duval, that the snapping of the line was the proximate cause of the decedent's injuries, and that the

defendant is liable to the plaintiff for such injuries to her decedent."

The Court of Appeals in reversing this ruling did not deny that these were findings a jury could make from the evidence and inferences. Instead the court took the position [8a - 24] :

"Although the evidence of diligent maintenance and the results of the inspection of the aft spring line before and after the accident doubtless sufficed to relieve the shipowner of any liability of negligence based on the condition of the line - - - - liability which plaintiff did not advance--it does not suffice to establish plaintiff's claim that negligent operation of

of the aft winch was the only or the most reasonable explanation for the parting of the line. - - -"

(underlining ours)

While the plaintiff contends that negligence in the defendant's docking operation was the most reasonable explanation for the parting of the aft spring wire, the Court of Appeals erred in making the test of acceptability the "only" or the "most reasonable" explanation.

The Court of Appeals in support of its position as to the standard of proof cited three authorities. The first involved a quotation from 1A Benedict, Admiralty, §118 at 6-25 (7th Ed.1979) [7a - 27]. Further on in this same section the authors stated at page 6-26:

> "When an accident which occurs is of sufficient unusualness,

> the finder of fact may fairly find that it could not have occurred but for negligence. If then the evidence indicates the control over the instrumentality by the defendant and excludes the conduct of the plaintiff as a causative factor, there is evidence on which the trier of fact may, not must, draw an appropriate inference.

When the evidence is all in, the question still is whether all the evidence in the light of common experience, reasonably shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved." (underlining ours)

It was undisputed that the entire docking operation was in the control of the defendant and the deceased did not have anything to do with the parting of the wire. Spring wires are not supposed to part if due care is exercised in such docking operations.

The second authority was the case of Mehra v. Bentz, 529 F.2d 1137, 1139 [2 Cir. 1975] cert. den. 426 U.S. 922, 96 S.Ct. 2628, 49 L.Ed.2d 375 [1976] [8a - 16]. This involved an automobile accident and an application of New York law. By contrast, this case involves maritime law and a maritime accident.

The third authority cited was Prosser, Torts, §39 at 211 [4th ed. 1971] [8a - 22]. What Dean Prosser states in his textbook is [page 211]:

> "----As long as the conclusion is a matter of mere speculation or conjecture, or where the

> probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained.
>
> This does not mean, however, that there must be in every case eye-witnesses of the defendant's conduct. Negligence, like any other fact, may be provided by circumstantial evidence. This is evidence of one fact, or a set of facts, from which the existence of the fact to be determined may reasonably be inferred. It involves, in addition to the assertion of witnesses as to what they have observed, a process of

reasoning, or inference by which a conclusion is drawn. - - - -"

Dean Prosser illustrates the above [at page 219]:

"Where such other causes are in the first instance equally probable, there must be evidence which will permit the jury to eliminate them. This means, for example, that a plaintiff injured by the explosion of a beer bottle purchased from a retailer will be required to make some sufficient showing that the bottle was not cracked by mishandling after it left the defendant's plant. Again, however, the evidence need not be conclusive, and only enough is required to

permit a finding as to the greater possibility. The plaintiff is not required to do the impossible by accounting for every moment of the bottle's existence since it left the defendant's plant; and it is enough if he produces sufficient evidence of careful handling in general, and of the absence of unusual incidents, to permit reasonable men to conclude that, more likely than not, the event was due to the defendant's negligence. - - - -"

(underlining ours)

Additionally, the Court of Appeals stated that the case of Marvin v. Central Gulf Lines, Inc., 554 F.2d 1295 (5 Cir. 1977) cert. den. 434 U.S. 1035, 98 S.Ct.

769, 54 L.Ed.2d 782 (1978) [14a - 11] was closely in point as a precedent. In that case a vessel was secured by bow and stern lines, and was to be moved backwards by having the stern line (aft spring line) pulled in by the ship's windlass. The plaintiff, a seaman, wrapped a hawser five or six turns around a windlass and took a position a few feet astern of it. He would apply tension to the hawser as it came off the rotating windlass, creating friction for the windlass to take in the line, and could stop the process by releasing tension on the line. He was struck in the face with what he believed was the hawser which "snapped back" after slipping off the fair lead. The plaintiff was the only witness. A parting of a line was not involved. By contrast in the present case, the entire

docking procedure including the use of the lines was in control of the defendant. There is nothing which would show that the deceased was responsible for the breaking of the aft spring line. In the Marvin case supra there was even a question as to what actually had happened. In this case there was ample evidence as to what had happened. The aft spring line snapped and struck the deceased. While both cases involved lines used on vessels, the nature of the accidents and the proofs submitted were very different.

It does not help with the analysis of the legal issues in this case to invoke or reject the Latin phrase res ipsa loquitor. In the comment to Restatement, Second, Torts, §328D the following is stated:

"b. Circumstantial evidence. Negligence and causation, like other facts, may of course be proved by circumstantial evidence. Without resort to Latin the jury may be permitted to infer, when a runaway horse is found in the street, that its owner has been negligent in looking after it; or when a driver runs down a visible pedestrian, that he has failed to keep a proper lookout. When the Latin phrase is used in such cases, nothing is added.

* * * *

e. Permissible conclusion. The plaintiff's burden of proof (see §328A) requires him to produce evidence which will permit the conclusion

that it is more likely than not that his injuries were caused by the defendant's negligence. Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof. The plaintiff need not, however, conclusively exclude all other possible explanations, and so prove his case beyond a reasonable doubt. Such proof is not required in civil actions, in contrast to criminal cases. It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation.

> This conclusion is not for the court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so."
>
> (underlining ours)

The facts in this case reasonably permit the conclusion that negligence is the more probable explanation for the accident.

The entire docking operation was under the control of the defendant [260a - 51], including the use of the aft spring line and the forward spring line. The vessel at the time was forward of the position it had to be to dock properly, and the manifolds on the vessel had to be lined up with the

chicksan on the dock (within a foot). The spring lines were used to help jockey the vessel into proper docking position with the help of two tugs and the bow thruster at the front of the vessel.

The risk of serious injury or death in being exposed to a whipping 1-1/8" thick wire is substantial. (The deceased's leg was fractured.) Those in charge of the vessel, in the exercise of reasonable care, must take this into account in conducting their docking operations. Reasonable care in these circumstances required a high degree of care to avoid snapping the lines considering the danger being created. Neither the deceased or his employer had any part in creating or managing this risk.

At the time of the accident the aft spring line was locked into position, the brake having been applied to it. It can

be inferred that as the vessel was being moved back to line up with the dock as desired, additional strain was placed on the secured aft spring wire, which could not slack, causing it to break.

It was the duty of those in control of the vessel to exercise reasonable care to prevent the line from breaking because of undue strain. How this was to be managed was solely in the defendant's control.

A jury could have concluded that the persons in charge of the docking failed to appreciate the danger being created when the aft spring line was locked into position with a brake being applied while the vessel was still being maneuvered backwards for a desired dock position. They could have concluded that somewhere in the chain

of people engaged in the docking of the vessel there was a failure to appreciate the true picture of what was happening or to pay proper attention to the line. This is the most logical explanation of this accident and it imports a lack of due care. There is nothing unreasonable, based on common experience,in such a conclusion.

The fact that other possible explanations existed does not mean that they were of equal weight or had to be accepted by the jury.

The Court of Appeals stated that there was no evidence that the ship, whose engines had been stopped, was in fact moving when the line parted, except "for the nearby completed movement toward the dock engendered by the tugs, which,of course, would diminish rather than augment any strain." [7a - 4; 9a - 33]. While

the court may infer this to be the fact, the jury did not have to and there was ample evidence to support a jury's findings. There was specific testimony that while the vessel was moving in to the dock at the time of the accident, the vessel was too far forward and the spring lines were being used to pull the vessel aft by putting tension on the spring lines. [246a - 11] The movement is achieved by hauling in on one spring line and slackening off on the other. [300a - 14]. However, at the time of the accident there was no slackening off on the aft spring line. The effect of pulling the vessel backward without any "give" in the aft spring line would be to increase the strain on it. At the time of the accident, the "bow thruster" at the front of the vessel was also being used. [289a - 18]. The jury did not have to conclude,

as the court did, that there was only an even handed lateral movement of the vessel generated only by the pressure of two tugs. If the court's logic is accepted and the spring lines were slackened at the time of the accident it is difficult to understand why the aft spring line would snap. This alone would support an inference that the line broke at this point in its use because it was under an unusual strain. Captain Newman specifically stated that in his opinion the wire parted because "there was too much of a strain put on it." [11a - 22].

The Court of Appeals suggests that a latent defect may have caused the break. It speculated that such "may have been detectable only by laboratory methods and not by the naked eye." [9a - 9]. There is nothing in the record

to support such a statement. The experienced seamen who examined the broken sections of the wire found no evidence of any latent defect. Additional evidence might go to the weight of such a finding, but this testimony alone supports a finding that no defect was involved. If the wire parted because of a "worn" condition as suggested by the court, this would provide another ground of negligence, i.e. failure to inspect the wire or use of an inadequate wire. But the ship's personnel denied there was anything wrong with the wire and the plaintiff made no such allegation.

POINT III

THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT DO NOT REQUIRE THE COURT TO FASHION A SPECIAL OR DIFFERENT RULE FOR DETERMINING NEGLIGENCE IN MARITIME CASES TO WHICH IT MAY APPLY

The opinion of the Court of Appeals based on its selection of the evidence and inferences to be made concluded [14a - 34]:

> "- - -; no other conclusion is compatable with Congress' direction that recovery against the ship may be had on proof of negligence pursuant to land based standards."

What 33 U.S.C. §905(b) actually says is that if a person, covered by this law, is injured "by the negligence of the vessel" he may bring a third-party action, but is specifically denied the right to sue for a breach of the warranty of seaworthiness. [14a-8].

Nothing in the statute indicates that any different standard of proof of negligence is required in this type of case as compared to any other maritime case. The test for determining what is or is not negligence and the quantum of proof necessary to justify a jury verdict should not vary from case to case. The arguments for rejecting such a distinction are stated in Gilmore & Black, The Law of Admiralty, 2nd Ed. 1975) §6-57 at page 453:

> "The principal problem for the courts in working out the elements of the §905(b) action will be the determination of what standards of negligence are to be applicable. It can be argued that the standards of negligence which have been developed in seamen's actions

> under the Jones Act should be applicable to the harbor worker's action under §905(b).

On the other hand it can be argued that negligence under the Jones Act does not (or will not) necessarily constitute negligence under §905(b). The argument will be that a ship-owner owes a higher degree of care to his own employees (crew members) than he does to longshoremen employed by a master stevedore. Thus he could be liable to a crew member suing under §905(b), even though, let us assume, both the crew member and the longshoreman had been injured at the same time by the same cause.

It is to be hoped that the

courts will reject the argument sketched at the end of the preceding paragraph and hold that Jones Act (and FELA) concepts of negligence apply to harbor workers' actions under §905(b).

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If the courts fashion the §905(b) action in the image of the Jones Act action, they will find helpful precedents for most of the problems that will arise in litigation. If they do so, the LHCA harbor workers will be substantially in the position of the Jones Act seaman (with compensation benefits substituted for maintenance and cure) except that the harbor workers will not be entitled to recover under the

no-fault fringes of the unseaworthiness doctrine. If the courts do not do that, the §905(b) U.S.C.A. annotations will in time rival the Jones Act annotations."

There appeas to be some disagreement among the circuits as to the applicable source of negligence law to be applied in these cases. For example, in Matthews v. Ernst Russ Steamship Company, 603 F.2d 676 (7 Cir. 1979); Santos v. Scindia Steam Navigation Co. Ltd., 598 F.2d 480 (9 Cir. 1979) the courts adopted a general maritime standard of law to be applied in negligence cases and in Samuels v. Empresa Lineas Martimas Argentinas, 573 F.2d 884 (5 Cir. 1978); Lubrano v. Royal Netherland Steamship Company, 572 F.2d 364 (2 Cir. 1978); Anuszewski v. Dynamic

Mariners Corp., 540 F.2d 757 (4 Cir. 1976) cert. den. 429 U.S. 1098, 97 S.Ct. 1116, 51 L.Ed 2d 545 (1977), which rely on common-law definitions.

In the recent case of Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9 Cir. 1979) the court reiterated the maritime standard of care to be applied at page 442:

> "Due to Congress' failure to define "negligence" as it used that work in 33 U.S.C. §905(b) (the amendment which permits the longshoreman to recover against the shipowner), the law on the subject in our circuit, and in others, was in a state of flux until the recent decision in Santos v. Scindia Steam Navigation Co., Ltd. 598 F.2d 480 (C.A.9, 1979).

Santos stated a standard of negligence to be applied in 33 U.S.C. §905(b) actions, as follows:

> "A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and (b) the shipowner fails to exercise reasonable care under the circumstances to

protect the longshoremen against the danger." At 485.

The standard of negligence applied in Santos conforms to the standard on the same subject announced in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-32, 79 S.Ct. 406, 410, 3 L.Ed.2d 550 (1959). There, the Supreme Court refused to distinguish between licensees, trespassers and invitees and held that the one standard should be applied to all, that is "reasonable care under the circumstances of each case." "

The District Court in charging the jury defined negligence in general language which was substantially close to

the standard set out above under (b) [576a - 577a]. The court did not apply the standard to any specific contention but left it to the jury to determine "what is reasonable under the circumstances of this case." [577a - 3].

There is no reason for the standard of law applied to be different where the plaintiff may be a longshoreman or harbor worker. Congress could have set forth a special or different standard in the law if it had intended to use the word negligence in any different or special sense.

"Due care" as used in negligence cases involves consideration of multiple factors. Restatement, Second, Torts, §282 defines negligence as conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm. Being

struck by a 1-1/8" snapped wire carries with it an unreasonable risk of harm. "Due care" required the persons docking the vessel to keep this risk in mind and to avoid the danger. The persons in charge of the vessel were in the best position to manage the vessel so as to avoid the risk. Restatement, supra, §289. The officers of the vessel knew or should have known the characteristics of the vessel, the wires used, and the dangers their maneuvers would create. Restatement, supra, §290. They knew or should have known that striking a person with a piece of 1-1/8" wire cable not only creates a risk of harm, but since such harm can easily involve serious injury and death, it is an unreasonable risk. Restatement, supra, §291, §292, §293. Customary practice is not the conclusive test of

reasonableness. Restatement, supra, §295A. Due care requires anticipation of foreseeable natural conditions. Restatement, supra, §302(h). While there are situations where a court will declare as a matter of law that certain conduct falls within or without the ambit of "due care", there is a very large area of conduct left to the judgment of the initial fact finder to evaluate in negligence cases. It is uncommon in negligence cases for a defendant to admit he was careless, failed to keep a proper lookout, inspected a certain area carelessly,etc. Juries traditionally make such findings on the basis of circumstantial evidence and the inferences they draw from the evidence.

The Court of Appeals, apparently feeling that the 1972 Amendments to

LHWCA command a different standard of proof for negligence, has departed from the established line of cases of this court which honor the jury's function in negligence cases.

Negligence should be defined in the same way in all maritime law cases and be judged by the same standards of proof.

CONCLUSION

There was ample evidence in the record of the trial below to support the jury's finding of negligence. The Court of Appeals in reversing the District Court's denial of a motion for judgment n.o.v., evaluated the evidence, and applied a very restrictive standard to the jury's role as a finder of fact, denying the plaintiff her right to a civil jury trial. This court should grant certiorari because this case involves an impor-

tant question of maritime law and the Court of Appeals has decided this case in accordance with standards of law inconsistent with the decisions of this court. This court has a unique role in supervising the development of maritime law.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 11—September Term, 1979.

(Argued September 10, 1979

Decided October 9, 1979.)

Docket No. 79-7054

ANNIE MCMILLAN, as personal representative of the Estate of EDGAR MCMILLAN, deceased, and on behalf of herself, individually,

Plaintiff-Appellee,

—v.—

MARINE SULPHUR SHIPPING CORP.,

Defendant-Appellant.

Before:

LUMBARD, FRIENDLY and GURFEIN,

Circuit Judges.

Appeal by defendant shipowner from a judgment of the District Court for the Southern District of New York, Constance Baker Motley, *Judge,* after a jury trial, awarding damages in a wrongful death action by the widow of a harbor worker under the

Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). Reversed on the ground that the court erred in refusing to grant defendant's motion for judgment n.o.v. because of plaintiff's failure to meet her burden of proof with respect to defendant's negligence.

TERENCE F. GILHEANY, Esq., New York, N.Y. (Cadwalader, Wickersham & Taft, New York, N.Y., John A. Sullivan, Esq., Peter G. Bergmann, Esq., and Carter B. Simpson, Esq., Of Counsel), *for Defendant-Appellant.*

RICHARD H. ABELSON, Esq., New York, N.Y. (Semel, Patrusky & Buchsbaum, New York, N.Y., Alan H. Buchsbaum, Esq. and Alan M. Getzoff, Esq., Of Counsel), *for Plaintiff-Appellee.*

FRIENDLY, *Circuit Judge:*

Plaintiff Annie McMillan, as personal representative of the estate of Edgar McMillan and in her own behalf, brought this wrongful death action under the Longshoremen and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), against defendant Marine Sulphur Shipping Corp. (Marine) in the District Court for the Southern District of New York. Section 905(b) allows an injured harbor-worker to sue a ship for negligence, subject to the provisions of 33 U.S.C. § 933, which protects the harbor-worker's employer or compensation insurer for

amounts paid or payable by them. A jury rendered a verdict awarding plaintiff $48,206 for past and $143,577 for future lost wages and $300,000 for loss of consortium. Marine moved for judgment n.o.v. on the ground that plaintiff had failed to carry her burden of proving negligence as required by the statute and for a new trial. The court denied all of Marine's motions except to require a remittitur reducing the award for loss of consortium to $120,000. Plaintiff accepted the remittitur and final judgment was entered in the amount of $311,783, from which Marine appeals. Although many other interesting points have been presented,[1] our conclusion that it was error to deny the motion for judgment n.o.v. renders it unnecessary to discuss them.

The accident occurred during the docking of Marine's ship, the Marine Duval, a 11,000 ton tanker, at Gardinier Terminal in Tampa, Florida, on the evening of November 18, 1973. Plaintiff sought to establish Marine's negligence largely through the

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1 These included whether it was error to have denied Marine's motion for summary judgment on the basis that because of an alleged undissolved prior common law marriage of Edgar's, plaintiff was not his widow; whether the verdict was clearly against the weight of the evidence; whether the district court erred in withdrawing the issue of McMillan's contributory negligence from the jury; whether because of the linguistic deficiency of one juror, the jury was improperly constituted; numerous questions about the award for compensatory damages; and whether, despite *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the effect of the 1972 amendments to LHWCA, *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618 (1978), and *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732 (5 Cir. 1978), see also *Westcott v. McAllister Bros., Inc.*, 436 F.Supp. 1039 (S.D.N.Y. 1978); *Giglio v. Farrell Lines, Inc.*, 424 F.Supp. 927 (S.D.N.Y. 1977), is to prevent or limit to "primarily symbolic" amounts, 436 U.S. at 619 n. 4 and 625 n. 20, awards for loss of consortium in actions under § 905(b).

deposition of Chief Mate Hoffman who witnessed the end of the accident, a statement of AB Seaman Hardwick Cooper who ran the aft winch, a statement of Port Relief Mate Marion Wright who, serving in the capacity of night mate, supervised the aft line and winch, and the testimony of George W. Newman, former Captain of the Marine Duval, who exercised overall responsibility for docking on the night of the accident but did not witness it and was no longer in Marine's employ at the time of the trial.

There is little dispute over the basic facts: On the night of the accident, the Marine Duval was docking port side to the Gardinier terminal with the aid of her own engines and the assistance of two tugs, the 1,600 horsepower Tampa on the starboard bow and the 2,000 horsepower Montclair on the starboard quarter. The ship's engines were stopped minutes before the accident, leaving only the pressure of the tugs to push the ship laterally to port and, in the Chief Mate's recollection, at an even pace toward the pier. The forward and aft spring lines went out between 9:05 PM and 9:07 PM. Both lines were affixed to a single bollard on a "mooring island"[2] by four shoreside workers, one of whom was Edgar McMillan. The shoreside workers did not take the safety precautions of donning life preservers or removing their rubber boots. Three of them, however, moved away from the bollard once the lines were fastened, while McMillan continued to stand near the wires. The function of the spring lines was to hold the vessel in the proper fore and aft position while the tugs pushed her to the dock.

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2 There was no evidence that this procedure was unsafe.

The aft spring line was payed out from the aft winch, which was operated by ABS Cooper under the supervision of the night mate, Port Relief Mate Wright. After the line had been affixed to the bollard and made taut, the winch was placed in a "stop" position. Cooper was near enough to the winch so that he could readily ease tension in the wire by paying out line but he received no direction and perceived no occasion to do so. At 9:10 PM, when the Marine Duval's portside came within one or two feet of the dock and six to nine feet of the bollard, the aft spring line parted,[3] struck Edgar McMillan and threw him into the water where he drowned.

At trial, plaintiff advanced the theory that the aft spring line parted after a build-up of excessive tension allegedly caused by defendant's failure to compensate for the movement of the ship in the operation of the aft winch and line. She endeavored to meet her burden of proof by attempting to show that defects in the line itself could not have caused the accident and then relying on opinion evidence to bridge the resulting explanatory gap and produce the inference that only defendant's negligence could have accounted for the parting of the line.

The testimony on the maintenance of the line and its condition both before and after the accident was uncontroverted. Chief Mate Hoffman stated in his deposition that it was his practice to inspect the Marine Duval's spring lines "[a]t least once a week" and to replace them if he discovered any defects. These weekly inspections included a search for rust or "dry spots," either of which might indicate

3 The break occurred over the dock, about a foot short of the loop securing the line to the bollard.

deterioration, and an examination of the wire for crimps or broken strands. In addition, the lines were "slushed," or treated with a liquid preservative, on the average of once a week. Plaintiff also offered a statement of the bosun that during the month preceding the accident the crew had inspected and slushed the aft spring line, but had not "end-for ended" it as had been done in September 1972.[4] Immediately after the accident the broken line was photographed and subjected to an initial examination. On the following morning Chief Mate Hoffman made a more thorough inspection of both ends of the broken line in the presence of Coast Guard officials. He concluded that there were no defects, "bad areas" or crimps near the point of breakage although the line manifested normal wear. The line was also examined by the bosun and by Captain Newman who found the wire "in very good condition". A portion of the line was submitted to the American Bureau of Shipping for more thorough examination, but the results of this, if any, were not introduced in evidence.

In contrast to the abundant evidence on the maintenance and appearance of the line, support for the claim of operational negligence was exceedingly limited. When asked for his opinion why the wire parted, Captain Newman said, "Well, there was too much of a strain put upon it." He fleshed this out by explaining "the ship is such a large thing and the tonnage is so great that nothing, nothing could stand up . . . if that ship gets moving. There is no wire

4 A line is "end-for-ended" when it is rewound on the drum of a winch after the lead and drum ends of the line have been reversed.

that could hold that ship." However, there was no evidence that the ship, whose engines had been stopped, was in fact moving when the line parted, save for the nearly completed movement toward the dock engendered by the tugs, which, of course, would diminish rather than augment any strain on the line. In addition, Chief Mate Hoffman, whose deposition was offered by plaintiff, testified that a wire should not part under the conditions to which the aft spring line was subjected on the night of the accident and that such a break was not expectable. Lastly, ABS Cooper, who had the best opportunity of any of the witnesses to observe the aft line, said in a statement also offered by plaintiff "At no time did I notice any undue strain on the wire" and Port Relief Mate Wright, who supervised Cooper, neither testified at trial nor advanced an explanation for the parting of the wire in the brief statement which plaintiff offered in evidence.

In a statutory action by a harbor-worker or his representative against the ship under 33 U.S.C. § 905(b), plaintiff has the same burden of showing negligence as a land-based worker would have in a suit against any other party. See H.R. Rep. No. 92-1441, 92d Cong. 2d Sess., 1972 U.S. Code Cong. & Ad. News 4698, 4702-03. The nature of this burden is described in 1A Benedict, Admiralty § 118 at 6-25 (7th ed. 1979).

> The plaintiff must establish directly or by just inference some want of care on the part of the master or the crew of the ship to which his injury may fairly and reasonably be traced. It is not enough for the plaintiff to prove that the

> negligence might perhaps have caused the injury. If the injury complained of might well have resulted from one of many causes, it is incumbent upon the plaintiff to produce evidence which will exclude the operation of those causes for which the master or the crew is under no legal obligation. If the cause of the injury may be as reasonably attributed to an act for which the master and crew are not liable as to one for which they are, the plaintiff has not sustained the burden of fastening tortious conduct upon the master or crew. The evidence showing negligence must come from witnesses who speak as knowers, not as guessers.

See also *Mehra v. Bentz*, 529 F.2d 1137, 1139 (2 Cir. 1975), *cert. denied*, 426 U.S. 922 (1976) (under both New York and federal negligence law, "[i]f the circumstantial evidence presented lends itself to several conflicting inferences, the trier of the fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts"); Prosser, Torts § 39 at 211 (4th ed. 1971).[5]

Although the evidence of diligent maintenance and the results of the inspection of the aft spring line before and after the accident doubtless sufficed to relieve the shipowner of any liability for negligence based on the condition of the line—a theory of

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5 Plaintiff disclaimed reliance on the principle of *res ipsa loquitur* in the trial and does not rely on it here. Reliance on *res ipsa loquitur* might have led plaintiff to a different evidentiary strategy, notably with respect to the condition of the wire, but it would not have altered plaintiff's fundamental burden of proof. See 1A Benedict, *supra*, at 6-25.

liability which plaintiff did not advance—it does not suffice to establish plaintiff's claim that negligent operation of the aft winch was the only or the most reasonable explanation for the parting of the line. Several competing inferences are equally plausible. One is the possibility of a latent defect, originating either during the manufacture or the subsequent heavy use of the wire, that may have been detectable only by laboratory methods and not by the naked eye. Such hidden defects are not unprecedented. For example, in *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore,* 508 F.2d 945 (4 Cir. 1974), a guy wire that passed visual inspection by a Department of Labor compliance officer was later found, during laboratory testing, to be heavily contaminated by salt and to contain a strand that broke "under a load far less than its nominal strength." *Id.* at 947, 948 n. 3. Here plaintiff did not offer the results of the ABS laboratory test. Another possibility is that the line just wore out. Captain Newman's opinion that the wire must have been subjected to excessive strain by a movement of the ship does not eliminate the possibility of a hidden defect or accumulated wear, particularly since his conclusion was predicated on his visual inspection of the wire and flies in the face of other evidence submitted by plaintiff herself, notably the statement of ABS Cooper. Chief Mate Hoffman's testimony suggested that unanticipated snapping of such wires—most of them presumably well maintained—was not infrequent. In addition, Captain Newman's opinion was unsupported by any evidence of ship movement in any direction other than even lateral progress toward the dock under the pressure of the tugs, which, as indicated, could only

have *decreased* the tautness of the line during the interval after it had been fastened to the bollard and the winch had been placed in the "stop" position. In an effort to overcome this evidentiary lacuna, plaintiff's brief in this court makes an extended argument that the Marine Duval may have been propelled away from the dock by a current or "shear."[6] Yet there was no evidence that there was any such current or shear, still less that anyone aboard the Marine Duval knew of it, and certainly none that this was known in time to pay out more line or that the probability of such a shear was so great as to require constant supervision of the line, even at a time when tension would be expected to decrease.

Even if we were to exclude the possibilities of a latent defect or accumulated wear, which we do not deem permissible for reasons stated above, negligent operation of the aft line and winch is not necessarily the most plausible inference that might be drawn from the record before us. In order to prove negligence plaintiff had to establish not only that the ship moved forward or to starboard and that this strained the aft line to its breaking point, but that such movement was sufficiently foreseeable, despite the lines and the pressure of the tugs to port, that the defendant was bound to maintain constant watch over the aft line and to pay it out, in the face of testimony, offered by plaintiff, from the person hav-

6 This argument derives from testimony by Chief Mate Hoffman that a vessel is subject to occasional "shears" in Tampa Bay during November and that such shears—described as a kind of eddy—would have tended to pull the Marine Duval to starboard. However, Hoffman also testified that he could not recall any movement of the ship at the time of the accident other than its tug-assisted lateral progress to port. Captain Newman's testimony was to the same effect.

ing the most direct knowledge of the wire's condition, ABS Cooper, that he saw no reason for doing so. Even if the ship moved, as Captain Newman hypothesized, this would not cast the Marine Duval in negligence absent proof of a duty to anticipate the movement or a failure properly to respond to it. *Cf. Banton v. Kawasaki Kisen, K.K.*, 1975 A.M.C. 1658, 1660-61 (E.D. Pa. 1975) (swells caused nondefective line to part although line was put to proper use). Such evidence was wholly lacking. The inference that ~~thre~~ there was no breach of duty on the part of the Marine Duval is entirely consistent with ABS Cooper's failure to notice undue strain on the wire; the lack of any indication that untoward ship motion, if in fact any occurred, was noticed in time to take corrective action; the general evidence that Marine Duval's docking procedures on the night of the accident were routine in all respects; and Captain Newman's testimony that shears, see note 6 *supra*, are sudden and unpredictable.

Beyond her primary allegation of negligence in the operation of the aft winch and line, plaintiff has advanced a second theory on appeal, namely, that Marine was under a duty to warn McMillan "of the danger involved in the tying up procedure"—meaning presumably a duty to warn McMillan to move to the far side of the mooring dock as his three companions had done.[7] Chief Mate Hoffman's recollection was

7 Indeed, plaintiff appears to advance yet a third theory of negligence on appeal: that Marine allegedly breached a duty to provide McMillan with "a safe place to work." On inspection, however, this purportedly distinct theory melds with the allegation of negligence in the operation of the winch and line. To the extent that plaintiff may have meant something more, § 905(b) of the LHWCA leaves the primary responsibility of ensuring safety on the docks to the dockowner and not the shipowner. See *Rich v. United States*, 596 F.2d 541, 554-55 (3 Cir. 1979). The same also vitiates plaintiff's assertion that Marine was under an extended "duty to warn" McMillan to don a life preserver and replace his rubber boots. As the court held in *Rich*, *id.* at 554, "in order to impose liability on the vessel owner under Section 905(b), we must be sure that it and not the stevedore is in the position best able to prevent similar accidents from arising in the future."

that, perceiving McMillan to have been "in a bad spot," he had warned "Keep clear." The jury was not bound to believe Hoffman's testimony, but its disbelief would simply mean that there was no evidence on the subject of warning. Assuming *arguendo* that Marine could be held liable for failure to warn an employee of the terminal operator against the risk of a line's snapping, it was plaintiff's burden to show that Marine had not issued an adequate warning—not Marine's to show that it had. Moreover plaintiff did not press this theory during the trial, the judge did not instruct upon it, and plaintiff took no exception to her failure to do so. Plaintiff cannot support the submission of her case to the jury on a theory of negligence which was not raised at trial with sufficient clarity to enable defendant to respond. See *Universe Tankships, Inc. v. United States*, 528 F.2d 73, 75-76 (3 Cir. 1975).[8]

8 These considerations are similar to the policies underlying the principle that new issues may not ordinarily be raised on appeal. As the Supreme Court observed long ago in that context:

> [o]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there on issues upon which they have no opportunity to introduce evidence. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

In essence plaintiff's case required the jury not only to disbelieve Chief Mate Hoffman and ABS Cooper but to believe the opposite of what they had said, i.e., that despite Hoffman's deposition testimony that he could not recall any movement on the part of the Marine Duval save for her even progress to port under the pressure of the tugs, she was in fact moving forward (although her engines were stopped) or to starboard (despite the pressure of the tugs); and that despite ABS Cooper's written statement that he noticed no undue strain on the wire, in fact the wire was being strained to the breaking point. One is inevitably reminded of Judge L. Hand's statement in *Dyer v. MacDougall,* 201 F.2d 265, 269 (2 Cir. 1952):

> [A]lthough it is . . . true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him. This is owing to the fact that otherwise in such cases there could not be an effective appeal from the judge's disposition of a motion for a directed verdict.

Indeed, in the present case a directed verdict is even more appropriate in one respect. The *Dyer* example

Here, for example, plaintiff's brief makes much of the point that McMillan "was not a longshoreman" but "a sandblaster doing maritime work." Defendant was able to respond in this court only with an employment card showing that McMillan had been working at the terminal since 1948 and the testimony of Annie McMillan acknowledging he had worked on ships during that time. If the issue of failure to warn had been raised at trial, Marine would have been able to develop McMillan's docking experience in greater detail.

required that the jury's evaluation of demeanor evidence yield to the opposing party's right to effective appeal from a disposition of a motion for a directed verdict. Here the testimony of Hoffman and Cooper was in writing. Thus, there is no danger of shunting aside the jury's considered evaluation of demeanor evidence necessarily outside the record.

Although it is rarely possible to find a precedent directly on point with respect to a plaintiff's failure to sustain the burden of proof with respect to negligence, *Marvin v. Central Gulf Lines, Inc.,* 554 F.2d 1295 (5 Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978), comes very close—indeed it is *a fortiori* in one respect, namely, that Marvin was "a Jones Act plaintiff suing in negligence" who "shoulders a lighter burden than his counterpart on land would carry." 554 F.2d at 1297, citing Gilmore & Black, Admiralty, §§ 6-35, 6-36 (2d ed. 1975). Here, as in *Marvin,* there is no evidence that the crew of the Marine Duval did anything they should not have done or failed to do anything they should have done. The *Marvin* court's distinction of cases in which recovery had been allowed for injury caused by a sudden movement of a line or rope, 554 F.2d at 1298-99, is also illuminating. In each of those cases, "the plaintiff seaman was able to present some evidence supporting some theory of negligence on the part of some employee for whose actions the employer was liable." *Id.* at 1299. When, as here, there is simply no basis for finding fault on the part of the ship, the harborworker's sole remedy is that afforded by the LHWCA, in this instance 33 U.S.C. § 909; no other conclusion is compatible with Congress' direction that recovery against the ship may

be had only on proof of negligence pursuant to land-based standards.

The judgment is reversed and the case remanded with directions to enter judgment n.o.v. in favor of defendant.

APPENDIX B

MEMORANDUM OPINION OF THE HONORABLE CONSTANCE BAKER MOTLEY, UNITED STATES DISTRICT JUDGE, FILED NOVEMBER 22, 1978

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ANNIE McMILLAN, as personal representative of the Estate of EDGAR McMILLAN, deceased, and on behalf of herself individually,

Plaintiff,

-against-

MARINE SULPHUR SHIPPING CORPORATION

Defendant.

: 74 Civ. 4678 (CBM)

: 47893

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APPEARANCES:

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CONSTANCE BAKER MOTLEY, D.J.

Memorandum Opinion

This wrongful death action brought under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 et seq., was tried to a jury which returned a verdict for the plaintiff in the amount of $491,783.00. Defendant has moved for judgment notwithstanding the verdict (N.O.V.) pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59(a).

I. Judgment Notwithstanding the Verdict

In C-Suzanne Beauty Salon, Ltd. v. General Insurance Co., 574 F.2d 106, 112 n.10 (2d Cir. 1978), the Second Circuit reiterated the standard to be applied by the court in considering a motion for judgment N.O.V. The Second Circuit quoted from its earlier

opinion in Armstrong v. Commerce Tankers Corp., 423 F.2d 957, 959 (2d Cir.), cert. denied, 400 U.S. 883 (1970), as follows:

> "...The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the nonmovant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him."

Defendant contends there was no evidence of negligence on its part. The court finds, in light of the standard set out above, that defendant has failed to show that judgment N.O.V. should be granted.

Plaintiff submitted evidence at trial that plaintiff's decedent, Edgar McMillan, was a shoreside employee of Gardenier Terminal Dock who drowned

after being struck and injured when a line tying up the S.S. Marine Duval snapped and whipped out, hitting McMillan.

During mooring, the Night Mate controls the after spring line while standing on the vessel's main deck. He directs the members of the crew who are stationed on the mooring dock below. A member of the crew operates the mooring winch for this line and either pays out the line, pulls in the line or holds the line in a stop position. Just before the accident, the line was taut and its windlass was in the stop position. The proper procedure is for the Night Mate to control the line so that no excess strain develops on the line. This can be done either by directing the crew member to pay out the line and create slack or by directing via walkie-talkie that the ship change

its movement so as to ease the tension on the line.

Both the line and the winch were found during a post-accident inspection to be free of any visible defect which would have caused the line to break. Plaintiff thus excluded such defects as possible causes of the accident, as it was required to do in order to place liability on the defendant. 1A Benedict on Admiralty (7th Ed.) §118.

Able-bodied Seaman Hardwick Cooper's statement (Pl. Ex. 9) was that he did not notice any undue strain on the line but that the "could see nothing of the action on the dock or forward as the cargo pumps were between me and the action." Chief Mate Robert Hoffman stated that it was his opinion that the line would not have broken if it had been properly used. Captain Newman, who

was in charge of the docking and mooring of the ship, stated that the line broke because too much stress had been placed on it due to some movement of the ship. Therefore, the court finds that there was sufficient evidence for the jury to infer that the line snapped because the strain put on it, that such strain was the result of improper supervision of the line by the officers of the S.S. Marine Duval, that the snapping of the line was the proximate cause of the decedent's injuries, and that the defendant is liable to the plaintiff for such injuries to her decedent. Therefore, defendant's motion for a judgment N.O.V. is denied.

II. New Trial

A. Weight of the Evidence

Defendant's motion for a new trial on the ground that the verdict was

against the weight of the evidence is denied for the reasons discussed above.

B. Contributory Negligence

Defendant contends that the court erred in ruling that there was no evidence of decedent's contributory negligence and removing this issue from the jury's consideration. Defendant's contention that there was evidence that the decedent failed to exercise proper safety by standing too close to the line which snapped is without merit. All shoreside employees were required to stand on the mooring island while handling the lines. Defendant argues that Chief Mate Hoffman had told the decedent to "keep clear", but there was no evidence that this was told to the decedent shortly before the accident or that it would have been possible for him to stand so as to avoid the line when it snapped. Chief Mate Hoffman testified

that at the time the line snapped he did not know where the decedent was standing and that the snapped line would have whipped "all over" when it broke free.

Defendant's reliance on Oddenes v. Universe Tankships, Inc., 188 F.Supp. 117, 122 (S.D.N.Y. 1960), is misplaced. In that case, the victim of the accident admitted at trial that it had been bad seamanship for him to have chosen to stand where he did at the time of the accident. There is no such evidence here that the decedent was negligent. Cox v. Flota Mercante Grancolombiana S.A., 577 F.2d 798, 805 n. 7 (2d Cir. 1978). Assumption of risk is not an issue in this case. The court finds that there was no question of contributory negligence in this case. Rivera v. Farrell Lines, Inc., 474 F.2d 255 (2d Cir. 1973). Defendant's motion

for a new trial on this ground is denied.

C. Competency of Juror

Defendant has moved for a new trial on the ground that one of the jurors was incompetent because he allegedly did not understand English.

In U.S. v. Dioguardi, 492 F.2d 70 (2d Cir. 1974), cert. denied, 419 U.S. 829 (1975), the Second Circuit stated the standard of review on a motion to impeach a jury verdict on the ground that a juror was incompetent. The court said at 78-79:

> "It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist ...Reluctance to inquire into the state of any juror and

> into the conduct of the jurors during their deliberation rests on sound reasons. The rule against any inquiry whatever recognizes exceptions only where there is clear and incontrovertible evidence of incompetence shortly before or after jury service..."

In Dioguardi the Second Circuit held that the district court was correct in refusing to inquire into a juror's competency after the defendant's conviction on mail fraud even though the juror had sent the defendant a letter after conviction which seven psychiatrists had stated, in their opinion, showed that the juror believed she was clairvoyant, and that she suffered from severe mental illness. The Second Circuit, with Judge Feinberg dissenting, rejected the psychiatrists' opinions, which were based only on the letter and not on examination of the juror, as "essentially horseback unin-

formed." Dioguardi, supra, at 78. The court held that only if there were "proof of adjudication of insanity or mental incompetence closely in advance of the time of jury service" should a court conduct a hearing to determine whether the disability affected the juror at the time of trial. The purpose of this rule is to prevent "inhibition of jury room deliberations, harassment of jurors and increased incidence of jury tampering." Miller v. U.S., 403 F.2d 77, 82 (2d Cir. 1968).

Dioguardi, supra, is still the law of this circuit. King v. U.S., 576 F.2d 432, 437-9 (2d Cir. 1978) (alleged prejudicial publicity); U.S. v. Mulligan, 573 F.2d 775 (2d Cir. 1978) (juror's letter to prosecutor).

In the instant case, the forelady sent out a note which stated:

> "Judge Motley: We have discovered that one of the jurors did not fully understand the proceedings because of a language difficulty. How should we proceed?"

It had been apparent to the court during the voir dire which it conducted that the juror spoke with an accent. The court satisfied itself, on the basis of the juror's ability to understand and answer the court's questions, that the juror understood English. The defendant did not object to the seating of the juror. The court finds that the forelady's note was not "clear and incontrovertible evidence", Dioguardi, supra, at 79, that the juror did not understand the proceedings. The note said that the jury felt that the juror did not "fully" understand the proceedings. Dioguardi clearly stands for the principle that the court should not inquire into the deliberations of the jury unless a strong

showing of prejudice is made. The court finds that, based on its own voir dire of the juror, that the jury forelady's note did not establish prejudice to the defendant such that the jury verdict should be impeached. See U.S. v. Silverman, 449 F.2d 1341 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972) (Juror's inability to read English and thus the exhibits in the case did not invalidate defendant's conviction of attempted tax evasion). See also U.S. v. Neary, 552 F.2d 1184, 1189-90 (10th Cir. 1977) (Juror's mistaken impression that she had served on a civil rather than a criminal case, as revealed in voir dire for a later trial during her jury duty, did not invalidate defendant's criminal conviction); U.S. v. Hall, 536 F.2d 313, 322-3 (2d Cir. 1976) (juror's physical condition).

Therefore, defendant's motion for a new trial on this ground is denied.

D. Unanimity of Jury Verdict

Defendant's contentions that the jury verdict was not unanimous is meritless. The jury returned a verdict of "No" to the first question on the special interrogatory form. When juror #2 was polled, he was asked "Is your answer to question number one 'No'?" He replied, "No". Given the verdict the proper form of answer to this question would have been "Yes, my answer is 'No'". When asked again, juror #2 pointed to the "No" answer on the special interrogatory form and said "No". The court found at that time that it was clear that juror #2 joined in the jury's answer of "No" to question

number one. Defendant's motion on this ground is denied.

E. Objections to Special Interrogatories

Defendant's contention that use of the plaintiff's full name in one of the interrogatories rather than the word "plaintiff" prejudiced him is frivolous.

Defendant also contends that a new trial is required because there was no special question asking the jury whether defendant's negligence was the proximate cause of decedent's injuries. Instead the interrogatory asked whether "plaintiff's" negligence had been a proximate cause of decedent's injuries. This was clearly a typographical error which in context was clearly understood to mean "defendant's" negligence. The court had already ruled that there was no proof of the decedent's contributory

negligence. The parties reviewed the interrogatories before they were submitted to the jury. Because the context was clear, the typographical error escaped even the defense counsel's notice and he did not object at trial to the wording of this interrogatory. It was not disputed at trial that the decedent died as a result of being struck by the snapped line and from no other cause. Therefore, the jury could not have been misled by this typographical error. Therefore, defendant's motion on those grounds is denied.

F. Damages

Plaintiff's expert witnesses' testimony which was based on wage data received from an official of the Tampa, Florida branch of the Chemical Worker's Union was admissible under Rule 703, Federal Rules of Evidence, as data

"reasonably relied upon by experts in the particular field." Indeed, defendant's expert witness testified based on wage data provided him by the personnel director of Gardinier Terminal.

Defendant's objection to the court charging the jury that it should apply a discount rate of 5% is without merit. Similarly, the court properly charged the jury that it should deduct a sum for the decedent's personal expenses from the amount of lost wages recoverable by the plaintiff. Defendant's objection to the charge of damages for loss of household services is also without merit. It could be inferred by the jury that the decedent helped his wife at home from the nature of his job, the level of the family's income and other cir-

cumstantial evidence presented at trial.

Loss of Society

Defendant's motion to reduce the jury's award for loss of society of $300,000 as excessive is granted. As the Supreme Court said in Sea-Land Services v. Gaudet, 414 U.S. 573 (1974), at 588-590:

> "Objection to permitting recovery for loss of society often centers upon the fear that such damages are somewhat speculative and that factfinders will return excessive verdicts...We are confident that the measure of damages for loss of society in a maritime death action can 'be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted.' ....Moreover, appellate tribunals have amply demonstrated their ability to control excessive awards...." (footnotes and citations omitted).

Defendant has cited several cases in which the court granted damages based on a yearly figure such as $1,000 a year, Public Administrator v. Angela

Compania Naviera, S.A., 74 Civ. 1293 (S.D.N.Y. 1978) (Motley, J.), or $3,000 a year, Consolidated Machines, Inc. v. Protein Food Corp., 428 F.Supp. 209 (M.D. Fla. 1976). However, the award for damages is to be based on the peculiar facts in each case. Moreover, the award for loss of consortium, like an award for pain and suffering, is within the discretion and good judgment of the trier of fact. Equal treatment in each case is plainly not required. The issue here therefore is whether this particular award can be fairly termed excessive. However, much deference is due to the jury award, even if it is higher than that which the court would have awarded in similar circumstances as the trier of fact.

The court finds that the award was excessive and the result of sympathy.

Therefore, the court has concluded that the $300,000 award here should be reduced by 60%, or $180,000. The award for loss of society is therefore $120,000. Bonn v. Puerto Rico International Airlines, Inc., 518 F.2d 89 (1st Cir. 1975) (award of $1,045,000 to three children for pain, suffering and mental anguish as a result of their parent's death in an airplane crash was held excessive). The total award is thus reduced to $311,783.

If the plaintiff is not willing to accept this remittitur, then the court will order a new trial on the issue of damages alone.

Summary

In summary, the court will grant a remittitur of 60% of the award made by the jury for loss of society. If the plaintiff does not accept this reduction, then the court will order a new

trial on the issue of damages. Defendant's other motions for a new trial are denied.

Dated: New York, New York
November , 1978

/S/
CONSTANCE BAKER MOTLEY
U. S. D. J.

FINAL ORDER AND JUDGEMENT WITH SPECIAL QUESTIONS TO THE JURY ATTACHED, FILED JANUARY 3, 1979 AND ENTERED JANUARY 4, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANNIE McMILLAN, as personal representative of the Estate of EDGAR McMILLAN, deceased, and on behalf of herself, individually,

Plaintiff,

-against-

MARINE SULPHUR SHIPPING CORP.,

Defendant.

----------X

74 Civ. 4678 (CBM)

ORDER AND JUDGMENT

#79,0013

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Constance Baker Motley, United States District Judge, and a jury, on March 28, 29, 30, 31 and April 1, 1978, and the Court having submitted the attached special questions to the jury, and the jury having

answered the said questions, and the jury thereafter having returned a verdict in favor of the plaintiff, and Judgment #78,802 having heretofore been entered herein on May 3, 1978, and the Court having entertained certain post-trial motions herein and having filed its Memorandum Opinion #47893 on November 22, 1978, and plaintiff, by and through her attorneys, SEMEL, PATRUSKY & BUCHSBAUM, ESQS., now having agreed to accept the remittitur as set forth in said Memorandum Opinion, it is

ORDERED: That Judgment #78,802 heretofore entered in this Court on May 3, 1978, be and the same is hereby vacated; and it is further

ORDERED, ADJUGED and DECREED: That plaintiff ANNIE McMILLAN, as personal representative of the Estate of EDGAR McMILLAN, Deceased, and on behalf

of herself, individually have judgment against defendant MARINE SULPHUR SHIPPING CORP., in the amount of $311,783.00, plus interest at the rate of 6% from April 2, 1978, with costs to be taxed; and it is further

ORDERED: That except as hereinabove provided, defendant's motion for judgment notwithstanding the verdict or for a new trial, brought on by notice of motion dated May 15, 1978, be and the same is hereby denied in all other respects.

Dated: New York, New York
December 29, 1979

/S/
CONSTANCE BAKER MOTLEY
U. S. D. J.

JUDGMENT ENTERED - 1/4/79

RAYMOND F. BURGHARDT
Clerk

APPENDIX C

STATUTORY PROVISION INVOLVED

Longshoremen's and Harbor Workers' Compensation Act
33 U.S.C. §905(b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person

was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.